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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

Mary Laura Brookins & al.,
Petitioners,

versus

South Bend Community School Corporation & al.

and

United States of America,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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NEW ISSUES RAISED BY A RESPONDENT

1. Reality of Cause of Action in Complaint alleging new, intentional, massive, enduring and inter-system discrimination in public education.

2. Timeliness in alleging discrimination in public education.

3. Preservation of issue of Court's refusal to process a Complaint.

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ARGUMENT

1. Petitioners allege discrimination in public education.

The most fundamental new issue raised by the Defendants[1] is not set out but is assumed. The Brief in Opposition is structured as if the Plaintiffs (re-styled, over objection, by the court below as "Petitioners for Intervention") had not filed a Civil Rights Complaint alleging that the South Bend School Corporation was discriminating in public education, was actually engaged in re-segregation, and was putting in place a massive and pervasive program of site elimination and site retention (in harmony with an adjacent White school system's program of school building) intended to lock in the separation of the races and turn back, insofar as possible, the increasing residential integration in the City of South Bend, while insulating a sister municipality and the surrounding county from residential and school integration.[2]

This assumption by the Defendants is consistent with the shared position, the effectively collusive position of the School System and the Justice Department below. Not only did they not address or show the slightest concern over the Plaintiffs' allegations or the exhibits attached to their complaint; they took the position that the gravity of the

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1. Only the Justice Department Defendants filed a Brief in Opposition. The School System Defendants declined to file a Brief, noting to the Clerk that the Department would present their issues.

   The Department wrongly approved a school segregation plan under the guise of a desegregation plan by apparently only looking at the temporary, busing statistics without studying the remainder of the plan, particularly the relevant demography and history.

2. As if corroborating the BROOKINS allegations the City of South Bend's Human Rights Commission on 8 February, 1984, issued a report showing the following pattern in South Bend's index of residential segregation: 1940, 83.4%; 1950, 86.4%; 1960, 85.8%; 1970, 80.3%; 1980, 66.2%. However, the report also noted that the surrounding county, including the adjacent City of Mishawaka to the East, remained almost exclusively White. There is a significant coincidence between the areas of increasing residential, racial integration between 1970 and 1980 and the areas from which the School Corporation removed public grade schools in 1981.

BROOKINS allegation of an unconstitutional segregation plan (which was also waste and constructive fraud) and the exhibits which showed it to be massive and pervasive were irrelevant[3]. Now, prior to the record being before this Honorable Court, the Defendants presume the position that there never was a Complaint alleging unconstitutional conduct in order to state their position.

The Complaint, however, unambiguously alleges intent to establish a dual system and lock in separation of the races[4].

Once identified as Petitioners for Intervention, though objecting by motion and memorandum on October 22, 1981, to this identification[5], the Plaintiffs as Petitioners for In-

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3. A copy of the Appellate Appendix containing statistics and maps has been lodged with the Clerk of this Court by the Petitioners.

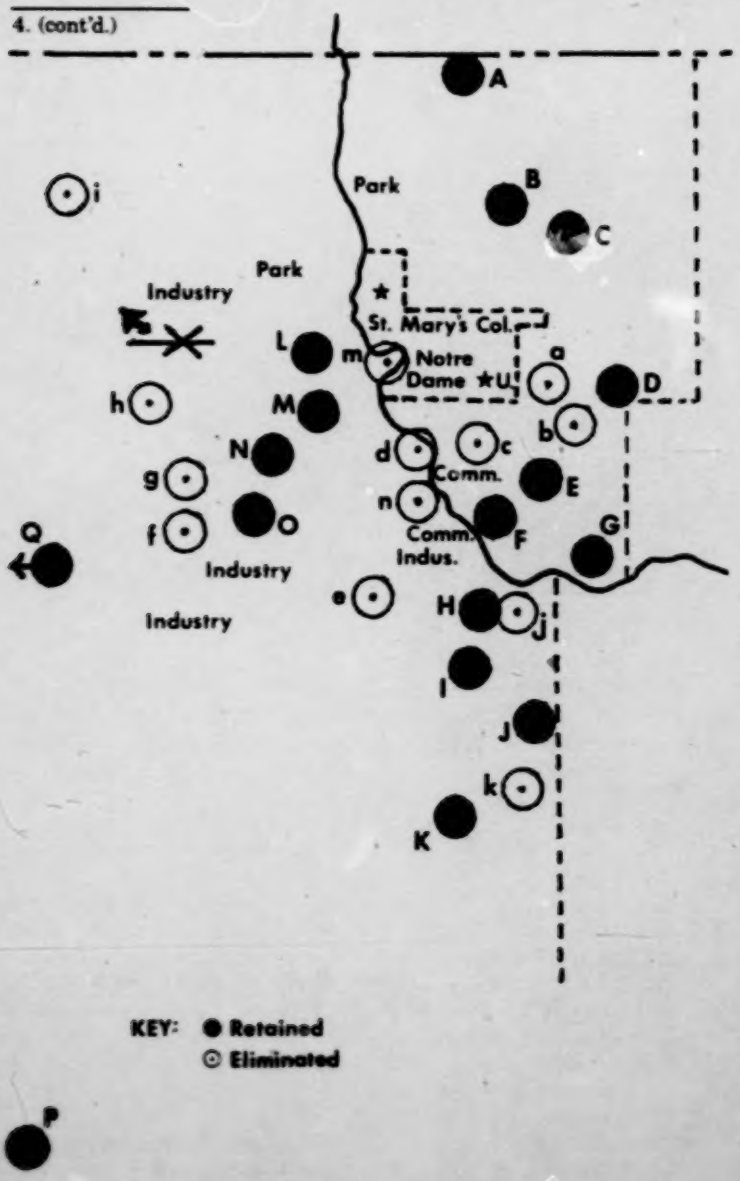
4. The general character of the issues raised and detailed by exhibits and the public record of land use is graphically summarized in this map of the grade school sites retained by the School System, marked with solid black disks and capital letters, and the school sites closed or changed to non-neighborhood use marked with open circles. On the East is the boundary of the Penn-Harris-Madison and Mishawaka systems' abutment to the South Bend School System, both Eastern systems being nearly exclusively White and both apparently sending Black students to the South Bend schools. Also shown are the barrier land uses adding to the isolation of the Black (and Hispanic — identified as White by the School System) pocket in Western South Bend, which the School System Defendants have dramatically completed.

   The percentage of Black students in each school shown, as of September, 1980, was, among grade schools retained: A, 0.41%; B, 6.14%; C, 0.15%; D, 11.48%; E, 30.24%; F, 23.91%; G, 7.11%; H, 59.15%; I, 7.46%; J, 5.30%; K, 1.65%; L, 44.08%; M, 48.17%; N, 83.72%; O, 63.82%; P, 0.78%; Q, 3.93%, and among grade schools closed or changed in use: a, 2.78%; b, 5.89%; c, 89.42%; d, 24.1%; e, 59.34% in a neighborhood 20% quod gerrymandering; f, 23.56%; g, 43.6%; h, 12.15%; i, 5.67%; j, 15.67%; k, 3.4%; and other schools closed: m, 39.41%; n, ?%. E and F are in wealthy areas while L and M are in the area of greatest Black population growth; under the "Plan" Black students are bused from near A to L.

5. A copy of the motion and memorandum are lodged with the Clerk of this Court.

tervention continued to point to the same fundamental, constitutional violations, to the same "frustra(ion of the). . . goal of a unitary school system" (GRAVES v. WALTON, 91 FRD 457, 474 (D.C. Ga., 1981), PATE v. DADE COUNTY SCHOOL BOARD, 588 F2d 501, 503 (5th Cir., 1979),

4. (cont'd.)



UNITED STATES v. MARION COUNTY SCHOOL DISTRICT, 590 F2d 146, 149 (5th Cir., 1979), UNITED STATES v. PERRY COUNTY BOARD OF EDUCATION, 467 F2d 277, 279 (5th Cir., 1978), JONES v. CADDO PARISH SCHOOL BOARD, 487 F2d 1275, 1277 (5th Cir., 1973), HINES v. RAPIDES PARISH SCHOOL BOARD, 479 F2d 762, 765 (5th Cir., 1973)[6], cf. ADAMS v. BALDWIN COUNTY BOARD OF EDUCATION, 628 F2d 895 (5th Cir., 1980)[7], SWANN v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, 402 U.S. 1, 20-21, 91 S.Ct. 1267, 1278-1279, 28 L Ed 2d 554, 569-570 (1971), CLARK v. BOARD OF EDUCATION OF LITTLE ROCK, 449 F2d 493, 499 (8th Cir., 1971), KEYES v. SCHOOL DISTRICT NO. 1, DENVER, COLO., 413 U.S. 189, 195-198, 93 S.Ct. 2686, 2691-2693, 37 L Ed 2d 548, 556-557 (1973), UNITED STATES v. BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, 494 F 2d 81, 87 (7th Cir., 1973), MCPHERSON v. SCHOOL DISTRICT NO. L86, SPRINGFIELD, ILLINOIS, 426 F. Supp. 173, 188 (S.D. Ill., 1976), PENICK v. COLUMBUS BOARD OF EDUCATION, 429 F. Supp. 229, 240-241, 252-254, 255, 259 (S.D. Ohio, E.D., 1977), COLUMBUS BOARD OF EDUCATION v. PENICK, 443 U.S. 449, 462, 99 S.Ct. 2941, 2949, 61 L Ed 2d 666, 680 (1979), UNITED STATES v. BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, 506 F. Supp. 657, 671 (S.D. Ind., 1979).

In the instant case the Plaintiffs and Petitioners for intervention illustrated the scale and depth of the Constitutional problem by filing supplementary exhibits (as they

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6. In Indianapolis, while potential, White intervenors were barricaded from intervention, Black students were granted intervention without indication of having to show any inadequacy of the "representative" (UNITED STATES v. BOARD OF SCHOOL COMMISSIONERS OF INDIANAPOLIS 466 F 2d 573, 575 (1972), presumably not simply on the basis of race but rather on the basis of the reason for intervention which, in turn, was affected by race.

7. UNITED STATES v. LOUISIANA, 669 F2d 314 (5th Cir., 1982) is not yet a true exception, because in that case the NAACP failed to use a previous grant of intervention and then sought a new one.

were prepared) during the long wait for rulings on the threshold motions[8].

Until now, there has been no doubt that complaints regarding public school discrimination must be heard[9], whether processed as simple complaints or processed as Court directed Petitions for Intervention, as in the Fifth Circuit.

2. The BROOKINS Complaint was timely.

Given that this action was filed as a Complaint against discrimination in public education, against current violations of Civil Rights, under 42 U.S.C. 1983 and Amendment XIV, inter alia, it was both ripe and timely.

That the Court, on the School System's Motion, restyled the BROOKINS Complaint as a Petition for Intervention did not make the filing untimely. Rather, it placed rigid restrictions on any application of timeliness requirements to Court created Petitioners for Intervention (Cf. the irrelevance of nine years in ADAMS v. BALDWIN.)[10], lest due process be denied.

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8. There was no announced stay though the Department wished one. The Department expressed not the slightest concern over the gravity of the allegations or the serious problems illustrated by the exhibits.

   There is no factual support for the statement (Brief in Opposition, p. 7) that the United States gave any "opportunity to...petitioners...to present their views." Moreover, the Department repeats the serious legal error made below in alleging that such an "opportunity" is a legally supportable substitute for a Court. Nothing grants jurisdiction to either the Department or the Board to decide prospectively a 42 U.S.C. 1983 action filed against them in a Federal Court.

   The finding by the District Court that the plan was "well within the Constitution...." (Ibid.) was made without evidentiary hearing, was made without the safeguards of a compromised class action, and, in any case, cannot bind the BROOKINS Plaintiffs (SAM FOX PUBLISHING CO. v. UNITED STATES, 366 U.S. 683, 689-690, 6 L Ed 2d 604, 609-610, 81 S.Ct. 1309, 1313 (1961)

9. CODD v. VELGER (Brief in Opposition, p. 9) is not an exception. This Court, divided, found there was no cause or case to be heard.

10. This, of course, points back to the conflict between the Circuits discussed in the instant Petition for Writ of Certiorari, as well as the fundamental right to be heard.

Moreover, neither the Department nor the Appellate Court recognized "that '(a)lthough in other litigation the Court's decision virtually marks the end of the case, in a school desegregation action it is scarcely the beginning.'" BROWN v. BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, 84 FRD 383, 403 (D.C. Kan., 1979). Nor did they recognize that in a desegregation case that since the "'issues the new group sought to represent and the ways in which the goal of a unitary school system had allegedly been frustrated...were (not) currently known to the Court...(and) determined...(on) a significant claim..., intervention would be allowed' (HINES v. RAPIDES PARISH SCHOOL BOARD, 479 F2d 762, 765 (5th Cir., 1973)...(and) would not disrupt the orderly processes of the Court" (BROWN v. BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, 84 FRD 383, 404 (D.C. Kan., 1979) and should not be judged untimely (Idem, 398-405).

The prejudice against the Plaintiffs or Petitioners for Intervention is, of course, extreme. Fundamental rights would be denied and the orderly process of the Court in hearing Civil Rights complaints would be brought to a halt[11], if Civil Rights Plaintiffs were required to either precipitiously rush into Court even without counsel or forever surrender fundamental, Constitutional rights.

In any case, a Civil Rights action is ripe and timely on each day of the violation and, if the Court restyles a valid complaint as a Petition for Intervention, it may not then retroactively apply rules for a situation it has imposed on previously pristine Plaintiffs.

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11. Lay people, outside of closed commercio-governmental planning discussions cannot be expected to understand all of the long range implications of a "complex and complicated socio-legal plan" (Brief of School System, p. 21), especially when the school system is engaged in a massive public relations campaign proclaiming its good intentions. (Cf. Petition For Writ of Certiorari, p. 26, #19.)

3. The Petitioners have consistently sought to have their complaint processed.

Continuously the Plaintiffs or Petitioners for Intervention have insisted on their right to due process, their right to be heard, a right so fundamental that it should not have been subject to doubt. They have never surrendered that right, developing the exposition of their rights if they were to be treated as Petitioners for Intervention under Fifth Circuit Law, while repeating their request for alternative relief, that is, restoration of themselves to the docket as simple Plaintiffs with their own case, in their formal prayer to the Appellate Court[12].

Moreover, the Appellate Court committed new error. While insisting that the Plaintiffs pursue a separate case, the Appellate Court refused to recognize that the Plaintiffs or Petitioners always wanted to pursue their own case and never "chose to piggy-back on the Department." The Appellate Court persisted in this apprehension even after request for correction on rehearing, and that error alone is a basis for granting Certiorari.

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12. In light of the Departments' argument (Brief, p. 3) questioning these Petitioners have lodged with the Clerk of this Court copies of their motion for relief from the exparte Order in the District Court as well as their Appellate Brief, their Reply Brief and their Request for Rehearing. UNITED STATES v. LOVASCO is completely inapposite because case LOVASCO never preserved the error in question nor raised it in any fashion until argument in the United States Supreme Court argument.

CONCLUSION

For whatever reason, the Justice Department does not appear to share the objective, which the BROOKINS Plaintiffs or Petitioners for Intervention have, namely, remedying a massive scheme for locking separation of the races into the future of South Bend, and the Department evidently does not share the Petitioners' interest in due process or in getting evidence of such a segregation program before the District Court for adjudication. Rather, they appear, as a practical matter, to be shielding the Defendant School System from judicial scrutiny. The Department is a practically adverse party providing no assistance to those towards whom it appears to assert a Guardian-Ward relationship and actively working to deny the Wards their right to be in Court on matters of fundamental Constitutional right as full-fledged Citizens of this Country.

The fundamental right of the Petitioners to be heard must be vindicated, not only to preserve their own rights but to avoid a mischievous precedent which would both make new governmental segregation easier and disrupt other substantive areas of law.

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